

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

TEODORO MIRANDA-SEVERINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No. 08-2304 (JAF)

(Crim. No. 05-323)

OPINION AND ORDER

Petitioner, Teodoro Miranda-Severino, brings this pro-se petition for relief from a federal court conviction pursuant to 28 U.S.C. § 2255. (Docket No. 1.) Respondent, the United States of America, opposes. (Docket No. 7.)

I.

Factual and Procedural History

On September 28, 2005, a federal grand jury indicted Petitioner and three other individuals on charges of aiding and abetting importation of cocaine and possession of cocaine with intent to distribute. (Case No. 05-323, Docket No. 10.) We set a trial date of November 29, 2005. (Case No. 05-323, Docket No. 28.)

On the day of trial, Petitioner learned from the government that his co-defendant had recently become a cooperating witness for the prosecution. (Case No. 05-323, Docket No. 81.) Upon receipt of that information, Petitioner entered a straight plea of guilty to the charges in the indictment. (Id.)

We held a sentencing hearing on March 1, 2006. (Case No. 05-323, Docket No. 82.) Based on the type and amount of narcotics,

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1 Petitioner's base offense level was thirty-eight under the United
2 States Sentencing Guidelines ("Sentencing Guidelines"). (Id.)
3 Following the recommendations in the presentence report, Petitioner
4 received a two-point reduction for acceptance of responsibility
5 pursuant to Section 3E1.1 of the Sentencing Guidelines and a two-
6 point upward departure for navigating the vehicle involved in the
7 offense. (Id.)

8 Petitioner's counsel, Luz Ríos, stated at the sentencing hearing
9 that she had not initially been aware that Petitioner met the
10 requirements for a safety-valve sentence reduction but, after
11 reviewing the presentence report, had realized Petitioner was, in
12 fact, eligible for the reduction. (Case No. 05-323, Docket No. 82.)
13 Ríos stated that upon discovering this, she had approached the
14 government on the Friday before the sentencing hearing, February 24,
15 2006, to arrange the necessary debriefing session so that Petitioner
16 could provide the requisite information to receive the safety-valve
17 reduction. (Id.) The government informed her it could not conduct the
18 debriefing on such short notice. (Id.) Ríos admitted that it was her
19 fault that her client missed the opportunity to qualify for the
20 safety-valve reduction. (Id.) Under the circumstances, we declined to
21 allow Petitioner more time to qualify for the reduction. (Id.) We
22 sentenced Petitioner to 235 months in prison and five years of
23 supervised release, following the low end of the applicable
24 Sentencing Guidelines range, 235 to 293 months, for a base offense
25 level of thirty-eight. (Id.) Petitioner appealed, and on August 2,
26 2007, the First Circuit affirmed his sentence. United States v.
27 Miranda-Severino, No. 06-1575 (1st Cir. Aug. 2, 2007).

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1 intention to plead guilty and (2) his trial attorney was ineffective
2 because she failed to investigate and pursue the safety-valve
3 reduction. (Docket No. 1.)

4 **A. One-Point Reduction Pursuant to Section 3E1.1(b)**

5 Petitioner contends that although he pled guilty on the day of
6 trial, he would have informed the government of his intention to
7 plead guilty earlier had he known of the cooperating witness.
8 (Docket No. 1.) Petitioner claims that the government's failure to
9 disclose the witness' testimony earlier excuses his untimely
10 notification and entitles him to an additional one-point offense
11 level reduction for timely notification of a guilty plea. (Id.)

12 The Sentencing Guidelines recommend a two-point reduction of a
13 defendant's offense level for acceptance of responsibility. U.S.
14 Sentencing Guidelines Manual § 3E1.1(a) (2005). The guidelines
15 recommend an additional one-point reduction for a defendant's timely
16 notification of his or her intention to plead guilty. Id. § 3E1.1(b).
17 Timely notification saves the government time and resources it would
18 otherwise invest in trial preparation. United States v. Arango, 508
19 F.3d 34, 40 (1st Cir. 2007); United States v. Ortiz-Torres, 449 F.3d
20 61, 76 (1st Cir. 2006). When a defendant pleads on the eve or morning
21 of trial, he is not entitled to the additional one-point reduction.
22 Arango, 508 F.3d at 40.

23 Contrary to Petitioner's argument, the government was not
24 required to disclose the cooperating witness' testimony prior to the
25 commencement of trial. See 18 U.S.C. § 3500(a); Fed. R. Crim.
26 P. 16(a)(2). The record indicates that the government had only
27 recently obtained the cooperation of Petitioner's co-defendant, as he

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1 did not plead guilty until November 28, 2005, the day before
2 Petitioner received notice that he would testify. (See Case No. 05-
3 323, Docket No. 25.) Petitioner was fully capable of accepting
4 responsibility earlier; instead, Petitioner waited until the day of
5 trial to plead guilty and, as a result, cost the government the
6 expense of trial preparation. (See Case No. 05-323, Docket No. 81.)
7 Petitioner was, therefore, not entitled to the additional one-point
8 reduction. See Arango, 508 F.3d at 40. Accordingly, we deny
9 Petitioner's § 2255 motion insofar as he asks us to award an
10 additional one-point reduction for timely acceptance of
11 responsibility.

12 **B. Ineffective Assistance of Counsel**

13 Petitioner asserts his trial attorney was ineffective because
14 she failed to investigate his eligibility for and timely pursue the
15 safety valve. (Docket No. 1.) The safety-valve provisions allow a
16 court to sentence certain defendants under the guidelines "without
17 regard to any statutory minimum sentence" and provide an additional
18 two-point offense level reduction if certain requirements are met.
19 18 U.S.C. § 3553(f); U.S. Sentencing Guidelines Manual
20 §§ 2D1.1(b)(7), 5C1.2 (2005).

21 To establish ineffective assistance of counsel, a petitioner
22 must show both that his counsel's performance was deficient and that
23 he suffered prejudice as a result of the deficiency. Strickland v.
24 Washington, 466 U.S. 668, 686-96 (1984). To show deficient
25 performance, a petitioner must "establish that counsel was not acting
26 within the broad norms of professional competence." Owens v. United
27 States, 483 F.3d 48, 57 (1st Cir. 2007) (citing Strickland, 466 U.S.

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1 at 687-91). To show prejudice, a petitioner must demonstrate that
2 "there is a reasonable probability that, but for counsel's
3 unprofessional error, the result of the proceedings would have been
4 different." Strickland, 466 U.S. at 694.

5 An attorney has a duty to conduct a reasonable investigation in
6 order to advise and represent his client. See Strickland, 466 U.S. at
7 691. This includes investigation in preparation for sentencing. See
8 Wiggins v. Smith, 539 U.S. 510, 522-23 (2003). Courts have held that
9 "[f]ailure to investigate and pursue the safety valve [falls] below
10 the objective standard of reasonableness" required of an attorney.
11 United States v. Boothroyd, 403 F. Supp. 2d 1011, 1016 (D. Or. 2005).

12 To show prejudice, a petitioner must show that he would have
13 satisfied the requirements for the safety valve at the time of
14 sentencing, and that this would have qualified him for a lower
15 sentence. See, e.g., Emezuo v. United States, 357 F.3d 703, 708 (7th
16 Cir. 2004); see also Glover v. United States, 531 U.S. 198, 203
17 (2001) (holding that any increase in jail time resulting from
18 deficient performance of counsel can constitute prejudice). The
19 safety-valve provision has five requirements: (1) the defendant must
20 not have more than one criminal history point; (2) the defendant must
21 not have used violence or credible threats during the offense;
22 (3) the offense must not have resulted in death or serious bodily
23 injury to any person; (4) the defendant must not have been an
24 organizer, leader, manager or supervisor of others in the offense,
25 and (5) no later than the time of the sentencing hearing, the
26 defendant must have truthfully provided the government all
27 information he had concerning the offense. See U.S. Sentencing

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1 Guidelines Manual § 5C1.2. In order to satisfy the fifth prong, a
2 defendant must provide all the information he possesses that
3 clarifies or supports the government's facts regarding the offense.
4 See United States v. Montañez, 82 F.3d 520, 523 (1st Cir. 1996). In
5 order to show prejudice, therefore, a § 2255 petitioner has the
6 burden to prove that he would have provided such information. See,
7 e.g., Emezuo, 357 F.3d at 708; see also United States v. Miranda-
8 Santiago, 96 F.3d 517, 529 & n.25 (1st Cir. 1996) (explaining that
9 when a defendant has credibly provided information, the government
10 must come forward with a sound reason to defeat defendant's claim).

11 Petitioner has shown that Ríos' performance fell below the
12 objective standard of reasonableness because she failed to
13 investigate whether her client was eligible for the safety-valve
14 reduction. (Case No. 05-323, Docket No. 82.); cf. Boothroyd, 403
15 F.Supp.2d at 1016. Ríos admitted that she failed to pursue the
16 safety-valve reduction because she mistakenly believed Petitioner was
17 a leader in the offense, disqualifying him from the reduction. (Id.)
18 She further admitted that she was under this impression because she
19 had failed to read the presentence investigation report earlier.
20 (Id.) As a result, Petitioner did not have the opportunity to qualify
21 for the two-point safety-valve reduction. (Id.)

22 If Petitioner had shown his eligibility for the safety valve at
23 the time of sentencing, his sentencing range would be 188 to 235
24 months instead of 235 to 293 months, and he would have received a
25 reduced sentence.¹ See U.S. Sentencing Guidelines Manual Ch. 5, Pt. A

¹At sentencing, we stated that we would "only [sentence Petitioner] to the lower end of the guidelines." (Case No. 05-0323, Docket No. 82.)

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1 (2005). Therefore, if Plaintiff was, in fact, eligible for the safety
2 valve, he has suffered prejudice as a result of his trial counsel's
3 error. The record shows Petitioner satisfied the first four prongs of
4 the safety valve requirement. (Case No. 05-323, Docket No. 40.) In
5 order to determine whether Petitioner suffered prejudice, however, we
6 must first determine whether he would have truthfully provided the
7 government with all the information he possessed regarding the
8 offense, to satisfy the fifth prong of the safety-valve provision. An
9 evidentiary hearing is, therefore, necessary on this issue.

10 **IV.**

11 **Conclusion**

12 For the foregoing reasons, we **DENY IN PART** Petitioner's § 2255
13 motion on the issue of timely acceptance of responsibility, and **ORDER**
14 an evidentiary hearing to determine whether Petitioner would have
15 provided truthful and complete information to the government to
16 satisfy the safety-valve provision.

17 **IT IS SO ORDERED.**

18 San Juan, Puerto Rico, this 30th day of June, 2009.

19 S/José Antonio Fusté
20 JOSE ANTONIO FUSTE
21 Chief U.S. District Judge